84-1776

Office-Supreme Court, U.S.
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APR 15 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

JOHN HANCHARIK,

Petitioner,

V.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

JOHN T. BENDER, ESQUIRE
114 Smithfield Street
Pittsburgh, PA 15222
(412) 261-1000

39pp

STATEMENT OF QUESTIONS

(1) Do the Pennsylvania Rules concerning waiver of an allegation of error, as applied in the present case, constitute a denial of due process as guaranteed by the Fourteenth Amendment, in that Petitioner has been unable to obtain a ruling on the merits concerning the admissibility of the confession?

(2) Did the suppression court err in refusing to suppress the confession, as Petitioner clearly and unambiguously attempted to assert his right to representation of counsel during the interrogation process?

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REFERENCE TO OPINIONS BELOW

A Writ of Certiorari is sought by John Hancharik from the denial of a Petition for Allowance of Appeal entered by the Pennsylvania Supreme Court in the case of Commonwealth v. Hancharik at No. 350 Allocatur Docket, 1984 on February 19, 1985. This denial affirmed an order of the Pennsylvania Superior Court in the same case at No. 1305 Pittsburgh, 1982, dated July 6, 1984, which affirmed an order of the Court of Common Pleas of Allegheny County, Criminal Division in the same case at No. CC7803900 entered November 18, 1982, denying relief under the Post Conviction Hearing Act.

The denial in question is as follows:

ORDER OF COURT

"February 19, 1985, Petition denied Per Curiam"

STATEMENT OF JURISDICTION

The order of the Pennsylvania Supreme Court, dated and entered on February 19, 1985, denied petitioner's request for allowance of appeal. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

1. "No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law . . ." Fifth Amendment to the Constitution of the United States.

2. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Sixth Amendment to the Constitution of the United States.

3. "No State shall . . . deprive any person of life, liberty or property, without due process of law . . ." Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was convicted of murder of the first degree in a jury trial in the Court of Common Pleas of Allegheny County, Pennsylvania. Post-verdict motions were denied and Petitioner was sentenced to life imprisonment. On November 3, 1980, the Pennsylvania Supreme Court affirmed the judgment of sentence by a per curiam order.

Commonwealth v. Hancharik, 491 Pa. 413, 412 A.2d 204 (1980). A subsequent Post Conviction Hearing Act Petition, filed in the Court of Common Pleas in Allegheny County, was denied on November 18, 1982. The Pennsylvania Superior Court affirmed the Post Conviction Hearing Act Court's denial of relief on July 6, 1984. On February 19, 1985, the Pennsylvania Supreme Court denied Petitioner's request for allowance of appeal, thereby prompting this Petition for a Writ of Certiorari.

The facts relevant to this proceeding are as follows. Petitioner was arrested in his home in North Versailles Township at 7:00 a.m. on June 30, 1978, and was charged with the April 20, 1977 murder of Pamela Lynn Norgren

(S.T. 22).[1] The arresting officers advised Petitioner of his Miranda rights and at 7:15 a.m., Petitioner signed a written waiver thereof (S.T. 25). Petitioner, however, gave no statements at that time.

Petitioner was subsequently taken to the North Versailles Police Station (S.T. 25). While Petitioner was lodged in the detaining cell, he had a conversation with Officer Gary Hackett, a long time acquaintence (S.T. 9). When Petitioner indicated that he would give a statement, Hackett found Police Chief William Brkovich and the pair went to Petitioner's cell (S.T. 11). When Petitioner agreed to give a tape recorded statement to Chief Brkovich, he was again advised of his Miranda

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[1]Indicates page number of suppression hearing transcript.

rights (S.T. 39). The record, however, contains no indication that Petitioner explicitly waived his rights at this time. Petitioner gave a short inculpatory statement to Chief Brkovich (S.T. 27). Petitioner was then taken to the Allegheny County Jail and he was arraigned shortly before noon.

When the authorities were reviewing the abovementioned tape, they discovered that portions of the tape were inaudible. Officer Hackett went to the Courthouse and filled in the inaudible portions from memory. The tape was then transcribed in typewritten form (S.T. 13). Subsequently, the transcription was reviewed by Assistant District Attorney Joseph Steele, Esquire. As Steele testified, ". . . I felt the confession was very short and lacked a great deal in terms of detail." (S.T. 43).

Steele, Brkovich and Assistant District Attorney Kim Reister, Esquire went to the County Jail to re-interview Petitioner (S.T. 433). Petitioner was again given the Miranda warnings; Petitioner indicated he would answer Steele's questions. Following a lengthy interview which was not recorded, Steele asked Petitioner if he would be willing to tape record the interview and Petitioner agreed to do so (S.T. 45).

After rewarning Petitioner of his Miranda rights, which he waived, Steele began interrogating Appellant (S.T. 47). During the course of the questioning, Petitioner attempted to assert his right to have counsel present during the interrogation (S.T. 52, 68). At this point the tape recorder was turned off. After a twenty minute discussion between Petitioner and the interrogators, Petitioner, with the tape recorder running,

again waived his Miranda rights and proceeded to confess to killing Ms. Norgren (S.T. 54).

Prior to trial, while represented by Robert Selko, Esquire and Michael Litman, Esquire, Petitioner filed a motion to suppress the statements, alleging, inter alia, that the statement given to Steele be suppressed since Steele impermissibly continued the interrogation after Petitioner had requested the assistance of counsel. Following a hearing on the suppression motion, the Suppression Court ruled that the statement was admissible.

As previously mentioned, Petitioner was convicted of murder of the first degree by a jury. While still being represented by Selko, Petitioner filed post-verdict motions which again questioned the propriety of admitting the statement given to Steele. Post-verdict

motions were denied and Petitioner was sentenced to life imprisonment.

Petitioner then filed a direct appeal to the Supreme Court. Trial counsel had withdrawn and Petitioner was represented on direct appeal by Leonard Sharon, Esquire. The admissibility of the statement was not challenged on direct appeal.[2] The Supreme Court affirmed the judgment of sentence. Commonwealth v. Hancharik, supra.

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[2]Appellant did allege that trial counsel had been ineffective in failing to request that the jury be instructed on the Massachusetts, or "humane" rule, which allows the jury to disregard a statement if they find said statement was involuntary. See Commonwealth v. Motley, 472 Pa. 421, 373 A.2d 764(1977).

Petitioner subsequently filed a pro se petition pursuant to the Post-Conviction hearing Act in the Court of Common Pleas of Allegheny County. The allegations contained in the Petition, while inartfully drafted, raised the issue of direct appeal counsel's ineffectiveness for failing to pursue the issue concerning the refusal to honor Petitioner's request for the assistance of counsel during the interrogation. Although Jack Conflenti, Esquire of the Allegheny County Public Defender's Office was appointed to represent Petitioner at the Post Conviction Hearing Act proceedings, Conflenti never filed an amended petition. Furthermore, Conflenti presented little evidence at the hearing and made no argument concerning direct appeal counsel's failure to challenge the admissibility of the confession. On November

18, 1982, the Court denied Appellant's Post Conviction Hearing Act petition.

Petitioner filed a Notice of Appeal to the Superior Court. Shortly thereafter, Petitioner's Post Conviction Hearing Act counsel withdrew and present counsel was retained. In the appeal to the Superior Court, Petitioner, being represented by present counsel, challenged the stewardship of both direct appeal counsel and Post Conviction Hearing Act counsel because of their failure to challenge the admissibility of the tape-recorded statement. Petitioner did not request an evidentiary hearing, as the question concerning counsels' stewardship was entirely dependant upon a determination of whether or not the confession was admissible. The Superior Court, in a memorandum opinion in support of a per curiam order dated July 6, 1984, affirming the Post Conviction Hearing

Act Court's denial of relief, held that Petitioner could not raise the question of counsels' stewardship for the first time on appeal for denial of Post Conviction Hearing Act relief. On September 18, 1984, the Superior Court denied Petitioner's request for reargument. Petitioner then sought allowance of appeal from the Pennsylvania Supreme Court which denied Petitioner's request on February 19, 1985. Having been through the Court system of Pennsylvania, twice reaching the Supreme Court, Petitioner has yet been unable to obtain a ruling from the Appellate Courts on the merits of the admissibility of the confession. Petitioner, therefore, seeks a Writ of Certiorari from this Honorable Court.

ARGUMENT

I. The Pennsylvania Rules concerning waiver of an allegation of error, as applied in the present case, constituted a denial of

due process as guaranteed by the Fourteenth Amendment, in that Petitioner has been unable to obtain a ruling on the merits concerning the admissibility of his confession.

Petitioner is essentially seeking no more than a determination by an appellate court in the Commonwealth of Pennsylvania whether or not the confession was properly admitted. The Superior Court, however, refused to reach the merits of Petitioner's claim, stating in its memorandum opinion:

As in Commonwealth v. Wright, 497 Pa. 492, 442 A.2d 230(1982), the present allegation of ineffective assistance, 'raised for the first time on this appeal, is sharply disputed by the Commonwealth, and must first be resolved in a proper evidentiary forum.' 497 Pa. at 499 Nn. 4, 442 A.2d at 233 n.4. Compare Commonwealth v. Dancer, 460 Pa. 95, 331 A.2d 435(1975) (absent extraordinary circumstances, claim of ineffective assistance waived if not raised on direct appeal from judgment of sentence).

It has long been settled that ineffectiveness of counsel can constitute an extraordinary circumstance precluding any finding of waiver because of prior counsels' failure to preserve an issue which, if preserved, would have entitled the criminal defendant to relief. Commonwealth v. Wideman, 453 Pa. 119, 306 A.2d 894(1973); Commonwealth v. Sherard, 483 Pa. 183, 394 A.2d 971(1978). It must be recalled that after direct appeal counsel's abandonment of the Suppression Claim which Petitioner wishes to have reviewed, present counsel advanced the claim by alleging ineffectiveness of both Direct Appeal and P.C.H.A. counsel at the earliest opportunity as required by Commonwealth v. Dancer, 460 Pa. 95, 331 A.2d 435(1975) and its progeny.

The previously quoted language of Wright, relied upon in the memorandum opinion, stated that an "unsubstantiated allegation" of

P.C.H.A. Counsel's ineffectiveness precluded review of the issue in question. Petitioner disputes a characterization of his claim that P.C.H.A. counsel was ineffective was unsubstantiated in this case.

The standard governing effective assistance of counsel, set forth in Commonwealth Ex Rel Washington v. Maroney, 427 Pa. 599 235 A.2d 349(1967), is essentially that counsel's action nor inactions will not be deemed ineffective unless no reasonable basis exists to justify the course chosen. Petitioner believes a dichotomy must be recognized between claims of ineffectiveness of trial counsel and similar claims relative to post-trial counsel. At trial, strategical decisions must be made according to counsel's evaluation of how the case is proceeding and hence would allow trial counsel to fail to object to inadmissible evidence for a myriad

of reasons. Once, however, trial is over, only legal errors are relevant. Once post-trial counsel fails to pursue a valid legal claim which would entitle a defendant to a new trial, there can be no reasonable basis to justify such inaction.

In Wright, the defendant therein, was attempting to challenge trial counsel's effectiveness for failing to object to the admission of evidence at trial. In order to prove those actions constituted ineffectiveness, the defendant would have had to have shown that no reasonable basis existed for counsel's failure to object when strategic considerations were taken into account and this generally could not be done without an evidentiary hearing at which counsel could explain his actions. In the present case, a determination of P.C.H.A. counsel's (along with direct appeal counsel's) effectiveness

depends on a review of whether the Suppression Court properly admitted the confession. If he did, then both counsel were not ineffective. But, if the confession was not admissible, a contrary conclusion is reached. Thus, there are no factual, as opposed to legal, disputes which need to be resolved at an evidentiary hearing.

If the Superior Court's ruling is correct, Petitioner could evidently obtain new counsel who could challenge present counsel's stewardship for failing to request a demand for an evidentiary hearing to preserve the question for review. At that point, present counsel would be called upon to explain his actions in this regard. Any such honest explanation which would then be given would show that counsel acted as he did because of his view that no factual dispute existed, thereby obviating the need for an evidentiary

hearing. Then, a Court could rule that counsel's analysis, though allegedly legally incorrect, constituted a "reasonable basis" justifying his actions. Petitioner would thus be finally precluded from ever obtaining review of the question involved. Such legal legerdemain obviously violates due process.

Even if Petitioner was successful in challenging present counsel's stewardship, any relief in the form of a new trial would not be available until eight years after the conviction in this case and three years after present counsel became involved. Such egregious delay in obtaining appellate review of a substantial constitutional question also amounts to a denial of the process where Petitioner has vigilantly attempted to pursue his constitutional claims.

II. The Suppression Court erred in refusing to supress the confession as Petitioner

clearly and unambiguously attempted to assert his right to representation of counsel during the interrogation process.

In Smith v. Illinois, 469 U.S. ____, ____, 83 L.Ed. 2d.488, 493-94, 105 S.Ct. _____, (1984) (Footnote omitted), this Court stated:

An accused in custody, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him." unless he validly waives his earlier request for the assistance of counsel. Edwards v. Arizona, 451 US, at 484-485, 68 L Ed 2d 378, 101 S Ct 1880. This "rigid" prophylactic rule, Fare v. Michael C., 442 US 707, 719, 61 L Ed 2d 197, 99 S Ct 2560 (1979), embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. See, e.g., Edwards v. Arizona, supra, at 484-485, 68 L Ed 2d 378, 101 S Ct 1880 (whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); Miranda v. Arizona, 384 US, at 444-445, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974 (whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking"). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on

finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. Edwards v. Arizona, supra, at 485, 486, n 9, 68 L Ed 2d 378, 101 S Ct 1880.

Petitioner contends that the present record supports his contention that he clearly asserted his right to the assistance of counsel.

When it ruled that the statement in question was admissible, the suppression court concluded, as a matter of law, that Petitioner knowingly and voluntarily waived all rights alluded to in the Miranda warnings. Finding of fact No. 16 explicitly states:

Defendant did not request the assistance of counsel prior to the giving of any statment.

In Commonwealth v. O'Bryant, 479 Pa. 534, ___, 388 A.2d 1059, 1061 (1978), the court stated:

On appeal from the denial of a suppression motion, this court must consider only the evidence presented by the Commonwealth and so much of evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. Where the court's

findings have ample support in the record, they may not be disturbed on appeal. (Emphasis added.) (Citations omitted.)

Even using this strict standard of review, Petitioner will show he is entitled to relief.

It is Petitioner's contention that finding of fact No. 16 is not supported by the record. To the contrary, the Commonwealth's evidence shows that Petitioner did in fact request the assistance of counsel during the interrogation process. At the suppression hearing, Steele testified that problems arose and the tape recorder was turned off. As Steele recalled the incident:

I said, "But again, do you understand that you are cooperating with me, that you have to waive your rights before we could go on with the additional tape?

And we went through each of the rights again, not only the questions of promises or threats but we went through the question of his attorney or his having an attorney.

And he said, "I don't know whether I should proceed without an attorney." (S.T. 52) (Emphasis added).

While the emphasized portion could be construed as an ambivilent assertion of appellant's right to counsel, the cross-examination of Reister shows the following:

Q. Mr. Reister, during the interview was there some reference made with regard to Mr. Hancharik requesting an attorney to be present?

A. Yes, sir.

Q. And did he in fact request an attorney to be present?

A. I cannot recall the exact words, but, in effect, yes.

Q. Did he in fact request an attorney to be present?

A. Yes. I believe we are referring to that there was a first taping session and at that first tape, that tape was terminated at the time Mr. Hancharik mentioned something he couldn't afford an attorney or he would feel better with an attorney or something like that.

Q. I see.

A. And at that point the questioning immediately stopped. (S.T. 68). (Emphasis added).

On direct examination, Reister testified:

Q. Mr. Reister, getting back to what you have just stated in cross-examination in regard to a discussion about an attorney, was there a request for an attorney at that time or that he would want to have one at the time of trial?

A. I am not sure of the wording but we were on the tape at the time that particular happening came up and I don't have any recollection of what that was but my recall is that he indicated he could not afford an attorney, or something and at that point we went off the tape. Whereupon Mr. Steele advised him of his right to have an attorney present at the time of trial and indicated one would be appointed for him.

Q. In other words, he told him he could have an attorney, then, in other words?

A. Yes, that's correct.

Q. And he could also have one appointed at time of trial if he didn't obtain his own?

A. That's correct. (S.T. 71-72). (Emphasis added).

Petitioner believes the Commonwealth's own evidence shows that the crucial factual finding cannot stand.

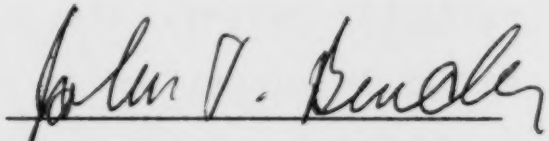
At various levels of the state court appellate proceedings, the Commonwealth has rgued that the request was ambiguous for two reasons. First, because Petitioner had waived his rights a number of times prior to the present occasion, the Commonwealth believes this creates an ambiguity. If this argument is correct, it follows that an accused could never change his mind. As this Court stated in Footnote 6 of Smith, "A request for counsel coming 'at any stage in the process' requires that questioning cease until counsel has been provided." Id. at ___, 495, ___ (Emphasis in original). Second, the Commonwealth points to its own witnesses' explanations of what occured after the request, while the tape recorder was off, to show ambiguity. Smith states that this is clearly improper.

Instantly, Petitioner unambiguously expressed a desire to exercise his right of

counsel. The interrogating individuals, rather than in some manner attempting to accommodate Petitioner's wishes, engaged in a colloquy lasting anywhere up to twenty minutes with the tape recorder off. Even if the explanation of the rights in question had been perfectly proper, the present situation can hardly be classified as one where Petitioner, on his own initiative, changed his mind and decided to waive his right to counsel. Considering the misleading explanation of the rights previously mentioned in that Petitioner was told counsel would be provided at trial, it is clear that the Commonwealth has failed to meet its heavy burden of providing that Petitioner voluntarily, knowingly and intelligently waived his right to counsel. Having failed to meet such burden, the suppression court erred in ruling that the statement in question was admissible. As a

result, Petitioner has been deprived of the rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,



John T. Bender, Esquire
Attorney for Petitioner

APPENDIX

Opinion of Lower Court
dated November 18, 1982 A

Memorandum opinion of the Superior
Court of Pennsylvania dated July 6, 1984 B

Order Denying Petition
for Allowance of Appeal C

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	C.C. 7803900A
	:	
JOHN HANCHARIK,	:	
DEFENDANT	:	

O P I N I O N

RIDGE, J. November 18, 1982

This matter came before the Court pursuant to John Hancharik's petition for relief under the Post Conviction Hearing Act. It is grounded upon allegations of ineffective assistance of appellate counsel. On December 4, 1978 a jury found the petitioner guilty of first degree murder and set the penalty at life imprisonment. Post-verdict motions were argued on February 9, 1979 and denied. Supplemental motions for a new trial and in arrest of judgment were denied on June 22, 1979. After petitioner's appeal, judgment of sentence was affirmed by the Pennsylvania

Supreme Court on November 3, 1980. The instant petition was filed on April 30, 1982 and hearings were held on October 27 and 28, 1982.

Appellate counsel, a lawyer of competence and experienced in criminal law, testified at the hearings that he had reviewed all records of the case including the transcripts of the suppression hearing and trial. He further testified that he had met the petitioner twice in order to find issues that had been preserved by the trial counsel and to determine which were meritorious.

The well-known test for effectiveness of counsel, enunciated in Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 34 (1967) requires that counsel's actions have "some reasonable basis designed to effectuate his clients interest." Measuring it against

this standard, we find petitioner's representation to have been competent and effective.

For which reason petitioner's prayer for relief is hereby denied.

Appendix A

[J. 35013-1934]

COMMONWEALTH OF PENNSYLVANIA	:	IN THE
	:	SUPERIOR
	:	COURT OF
	:	PENNSYLVANIA
V.	:	
	:	No. 1305
	:	Pittsburgh,
	:	1982
JOHN HANCHARIK,	:	
	:	
Appellant	:	

Appeal from the P.C.H.A. order entered November 18, 1982, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, at No. CC7803900A.

BEFORE: McEWEN, OLSZEWSKI AND ROBERTS, JJ.

MEMORANDUM:

This is an appeal from an order of the Court of Common Pleas of Allegheny County denying relief under the Post-Conviction Hearing Act. Appellant alleges, for the first time on this appeal, that PCHA counsel was ineffective for failing to pursue the claim that appellant's prior counsel provided

ineffective assistance. Appellant maintains that prior counsel should have challenged the lawfulness of inculpatory statements which appellant had given to police.

As in Commonwealth v. Wright, 497 Pa. 492, 442 A.2d 230 (1982), the present allegation of ineffective assistance, "raised for the first time on this appeal, is sharply disputed by the Commonwealth, and must first be resolved in a proper evidentiary forum." 497 Pa. at 499 n.4, 442 A.2d at 233 n.4. Compare Commonwealth v. Dancer, 460 Pa. 95, 331 A.2d 435 (1975) (absent extraordinary circumstances, claim of ineffective assistance waived if not raised on direct appeal from judgment of sentence).

Accordingly, the order denying post-conviction relief is affirmed.

Appendix B

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

February 21, 1985

John T. Bender, Esquire
114 Smithfield Street
Pittsburgh, Pennsylvania 15222

In Re: John Hancharik v. Commonwealth of Pennsylvania No. 350 W.D. Allocatur Docket 1984

Dear Mr. Bender:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

ORDER OF COURT

"February 19, 1985
Petition denied
Per Curiam"

Very truly yours,

Carl Rice, Esq.

CR/cs

cc: Robert Coville, Esq.
District Attorney
Robert L. Eberhardt, Esq.
Deputy District Attorney
401 Court House
Pittsburgh, Pa. 15219

Hon. Joseph H. Ridge
Court of Common Pleas
526 Court House
Pittsburgh, Pa. 15219

Appendix C